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SUBJECT: EU CODE OF CONDUCT ON ARMS EXPORTS: QUESTIONS AND ANSWERS

REF: A. BRUSSELS 1510

¶B. USEU TODAY 04/06/04
¶C. BRUSSELS 1464
¶D. STATE 68263 AND PREVIOUS

Classified By: USEU Poloff Van Reidhead for reasons 1.4 (b) and (d)

Summary

¶1. (SBU) This message is intended as a companion to Mission reporting (refs A, B, C) about the possibility that the EU may soon lift its arms embargo on China. In place of the embargo, some EU Member States favor enhancing the EU Code of Conduct on arms exports, either in general or with specific regard to China. To inform thinking on this possibility, we offer below answers to commonly asked questions about the Code of Conduct. In para 19 we also provide the text of a non-paper the EU uses to describe the Code. We conclude that the Code of Conduct, while generally positive, is no substitute for the China arms embargo.

All documents mentioned here are available at http://ue.eu.int/pesc/ExportCTRL/en/Index.htm

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What is the Code of Conduct?

¶2. (U) Adopted in 1998, the EU Code of Conduct (CoC) on Conventional Arms Exports has two objectives. The first is to reaffirm the eight criteria for evaluating export applications agreed to by EU leaders in 1991 and 1992 at the Luxemburg and Lisbon Summits. These criteria include the political commitment of EU member states not to sell military equipment to countries if doing so would, among other things, threaten regional stability, contribute to internal repression, or threaten the interests and security of European allies.

¶3. (U) The second objective is to foster the gradual convergence of national export policies and licensing procedures by creating a system for consultation and information sharing. The CoC's twelve operative provisions require EU member states to report to each other any denials of applications for export licenses when those denials are based on CoC criteria. In 2003 EU member states also agreed to apply the CoC to all applications for arms brokering licenses. The underlying idea is that through openness and consultation, EU member states will be able to foster an EU-wide export norm that upholds European values and reduces the risk of competitive undercutting, while at the same time preserves the sole right of European nation-states to determine their own export policies.

Does it apply to all countries?

¶4. (C) Yes. The CoC is universal and non-discriminatory, and should be applied when evaluating transactions to all third countries. (COMMENT: One problem with the idea of creating an enhanced CoC relevant only to post-embargo China is that the EU does not want to be discriminatory. Another is that it would contradict the political signal that the EU would wish to send by lifting the embargo. We believe that, strengthened or not, the CoC will remain universal and non-discriminatory. However, it is possible that the EU will move toward some kind of new -- unwritten and non-public -- "gentleman's agreement" to restrict certain transactions with a post-embargo China. END COMMENT).

What kinds of transactions does it cover?

¶5. (U) The CoC applies to all transactions involving items included in the EU Common Military List. It also applies to items on the EU Dual-Use List if the purchaser is the military or internal security forces of the country in question. Member states are also committed to apply the CoC to items on their national control lists when those items do not appear on the common military list.

What does the EU Common Military List cover?

¶6. (U) The Common List was updated in 2003 to mirror the Wassenaar Munitions List of controlled items. The EU adopted the Wassenaar list because it was an expedient way to achieve consensus on an updated EU list. However, the two lists are not directly linked. Updates to Wassenaar will not automatically entail updates to the EU list.

What about dual-use items?

¶7. (U) Member States are obligated under a legally binding Council Regulation adopted in 2000 to regulate the export of dual-use items identified in a control list annexed to the regulation. The list compiled from all entries in the dual-use control lists maintained by the Wassenaar Arrangement, Missile Technology Control Regime, Australia Group, Nuclear Suppliers' Group, and Chemical Weapons Convention. Updates to regime lists are automatically transcribed into the EU list. The regulation also includes the "transmission of software or technology by electronic media, fax or telephone."

¶8. (U) National experts monitor implementation and exchange information in a dual-use working group chaired by the Commission. The general aim of the regulation is to ensure the free movement of goods and technology within the EU while providing for a common standard of control for transactions with parties outside EU borders.

¶9. (U) Member States are obligated to apply the CoC to items on the Dual-Use List when the purchaser is identified as the military or internal security service of a third country.

What is the CoC Users' Guide?

¶10. (U) The Users' Guide was drafted by the COARM working group in 2003 to describe standard operating procedures for adhering to the CoC.

What are Member States obligated to report?

¶11. (SBU) Significantly, the CoC only applies when an EU member state denies an export or brokering application, and then only if the denial was based on CoC criteria. There is no/no obligation for EU member states to report when they grant export licenses. (COMMENT: This means there is no easy way to evaluate the impact the CoC has had on arms transfers since 1998. Evidence of how seriously member states take the CoC must be gleaned inferentially through national export reports. END COMMENT)

¶12. (U) EU member states are obligated to inform each other, through the Council Secretariat in Brussels, when they deny license applications based on CoC provisions. Denial notifications, and when applicable the amendment or revocation of denial notifications, are supposed to be submitted using a standardized explanation form. Member states are also supposed to consult the Council Secretariat's central database of denial notifications each time they evaluate an export or brokering license. If, after querying the database, they discover that another member state denied an "essentially identical" transaction within the past three years, they are supposed to consult the state that originally denied the application before making any final adjudication of the application (Note: The original denying country does not have a veto over subsequent decisions to grant licenses.) These are intended as confidential bilateral consultations that bypass the Council Secretariat.

What about intangible technology transfers?

¶13. (U) The CoC does not address the transfer of intangible technology that might be used in the production of items on the common military list. Recognizing this as a loophole, but as yet unwilling to take it up at the EU level, member states in 2001 endorsed the importance of establishing controls and agreed to deliberate further, a process which is still ongoing. By contrast, the EU's Dual-Use Regulation mandates controls on technology transfers by electronic media, fax or telephone (including oral transmission).

What about end-use certificates?

¶14. (U) The CoC does not say anything about end-use certificates. However, within the context of the CoC's call for policy convergence, member states have agreed on the types of information that should be included in end-use certificates when such certificates are required by national export regulations. The hope is that member states without end-use certification requirements will use the agreed certification format as a basis for creating their own regulations.

How is undercutting handled?

¶15. (U) The "Compendium" of agreed practices attached to the annual COARM reports says that Member States agreed in 2001 to share information whenever they decide to undercut each others' export decisions. As presented, the idea is not to name and shame but to "highlight different interpretations of the (CoC) criteria." For that reason, according to the Compendium, Member States deciding to undercut their partners "agree to share, to the extent compatible with national considerations and on a confidential basis, information on the undercut decision not only with the State responsible for relevant denial, but in the context of COARM deliberations, with all Member States."

How is the CoC monitored?
Is there public oversight?

¶16. (SBU) The CoC is largely peer monitored by Member State experts in the COARM working group. The Council Secretariat maintains a central database of CoC activity. Every year the COARM group issues a report on CoC implementation and Member State progress toward policy convergence. A "Compendium" attached to the annual report details new or emerging areas of Member State agreement within the CoC framework. The report is public and is presented to the European Parliament for consideration (although the EP has no authority over the CoC). It is not clear the extent to which national parliaments or public interest groups monitor EU exports under the CoC.

Does peer pressure play a role?
Do member states 'name and shame' for bad behavior?

¶17. (C) We are unsure of the extent to which CoC-based peer pressure plays a role in national export decisions. As a "gentlemen's agreement," the CoC relies on the likemindedness and good intentions of national governments, not on fear of punitive action at the EU level. Rosemary Chabanski and John Mattiussi, respectively the Council and Commission COARM reps and leads on the EU Code of Conduct, report that member state reps are sometimes subjected to "mild chiding" from colleagues in the monthly COARM meeting when their countries make questionable licensing decisions (e.g. along the lines of, "So what did you sell that for?" or, "How are you going to justify that one?"). Asked if more serious (i.e. naming and shaming) pressure was ever exerted, Chabanski replied, "A teeny-weeny bit in one case." Both report being unaware of any occasion on which these discussions were pushed up to a political level.

What about all the talk of strengthening the CoC?

¶18. (C) There is some talk of "tweaking" the COC in general, in order to make it more effective and useful to member states, but the occasional call to make the CoC legally binding has to date fallen on deaf ears. The UK and France -- with the EU's largest defense industries -- are firmly opposed to the idea. During an April 2 discussion by the Political and Security Committee, Greece was the only country to come out in support of a legally binding CoC, a position that a UK contact described as "provocative" (ref A).

EU CoC non-paper

¶19. (U) The EU describes the CoC with the non-paper below.

BEGIN TEXT OF NON-PAPER:

EU Code of Conduct

The EU Code of Conduct on Arms Exports was adopted by the Member States, within the framework of the Common Foreign and Security Policy, in May 1998 (following agreement in 1991 and 1993 on criteria to be applied to arms exports).

It is a politically binding document aimed at creating high

common standards when assessing applications for the export of military equipment, listed in the agreed Common List of Military Equipment, to states outside of the European Union. It establishes eight criteria for judging whether a particular export should take place.

The operative provisions of the Code of Conduct provide for the notification of denials and for confidential consultations among the Member States concerned. These procedures give Member States a great comprehension of each other's reasons for refusal to export and hence increase mutual understanding of Member States' export licensing policies.

The final decision on whether or not to export remains at the discretion of the Member State to which an application for a transaction/export involving arms and weapons systems has been made. (Conventional arm exports are not an area of Community competence. Member States have up to now, on the basis of Article 296 (ex-Article 223) of the EC Treaty exempted the trade in arms from the scope of application of treaty rules.)

Member States exchange information annually on their arms exports and on this basis an annual report is produced. This provides for a common assessment of the functioning of the Code.

From 1998 to 2000 the Annual Reports of the Code of Conduct did not contain figures on the number and value of licences granted per destination; nor did they indicate numbers of licences refused. These figures have been included in the reports from 2001. Thus the fourth and fifth annual reports contain figures for the number of licences granted by each Member State, as well as the value of such licences and/or the value of actual exports for each destination.

Member States are currently considering in the Council Group dealing with conventional arms transfers (COARM) how they can improve the EU Code of Conduct.
END TEXT OF NON-PAPER.

Comment

¶20. (C) The CoC is a marginally positive tool for managing EU arms exports, but it is no substitute for the EU arms embargo on China. Both are relatively weak political instruments (the embargo itself is contained in only eight words from a 1989 EU Summit declaration that calls for "an embargo on trade in arms with China"). EU Member States have sold considerable amounts of military equipment to China even under the embargo (as the 2003 COARM Report shows), but after a certain point, such sales would entail certain political costs to the selling nation. The same is not true of the CoC. Under the CoC, Member States would have much more room for maneuver in deciding whether or not China satisfies the agreed export criteria. And if the embargo is lifted, Member States will even be able to point to that event -- the end of the embargo -- as partial evidence for determining that China is an acceptable purchaser under the CoC.

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